ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CA07-777

March 12, 2008

BEAVER WATER DISTRICT APPELLANT	AN APPEAL FROM BENTON COUNTY CIRCUIT COURT
v.	[No. CV 2003-67-3]
HERSCHEL GARNER and DENISE GARNER, Husband and Wife; and JESSICA NORMAN APPELLEES	HONORABLE JAY FINCH CIRCUIT JUDGE AFFIRMED

Appellant Beaver Water District brings this appeal from the judgment of the Benton County Circuit Court awarding prejudgment interest of 7% and attorney's fees in a condemnation case. The District raises four points for reversal. None of the District's points have merit. Therefore, we affirm the circuit court.

The District filed its petition for condemnation and immediate possession on January 15, 2003, seeking to condemn approximately seventy acres belonging to appellees Denise and Herschel Garner. The District also deposited $427,545 into the registry of the court as the estimated compensation due the Garners.[1] The circuit court entered an order of immediate possession on January 23, 2003. The District filed an amended petition adding as

[1]The District later deposited an additional $25,000 into the registry, representing the value of a cabin located on the property.

a respondent Jessica Norman and asserted that she may have a leasehold interest in the property.

The Garners answered the petition, denying that it was necessary for the District to take their property or that the District should have immediate possession of the property. They also filed a motion seeking to set aside the order of immediate possession.

After protracted proceedings related to the discovery of the District's basis for the taking, the Garners conceded the issue of the necessity of the taking on March 28, 2005. Trial was held on August 2, 2006, resulting in a verdict for $900,000 in favor of the Garners.

Thereafter, the Garners filed a motion and brief seeking entry of judgment on the jury's verdict. The Garners sought prejudgment interest at the rate of 9% on the $900,000 amount of the jury's verdict from January 23, 2003, the date of the taking, until March 28, 2005, the date the Garners conceded the issue of the necessity of the taking; prejudgment interest at the rate of 9% on the sum of $447,455, the difference between the amount of the jury verdict and the amount deposited by the District from March 28, 2005, until entry of the judgment; all reasonable attorney's fees; and postjudgment interest on the $447,455 and the prejudgment interest and attorney's fees. Attached as an exhibit was the affidavit of the Garners' attorney seeking attorney's fees and costs totaling $76,785.94. Of this sum, $50,743.24 was for fees and costs incurred prior to the concession of the issue of necessity, and $26,042.70 was incurred in connection with the issue of the amount of compensation.

In response, the District argued that the Garners were not entitled to prejudgment interest because prejudgment interest was an element of just compensation on which they had the burden of proof and offered no evidence on this element. The District also objected to

the 9% rate of prejudgment interest sought by the Garners, arguing that a more appropriate rate would be 2.875%, based on the average yield of one-year certificates of deposit (CDs). The District also opposed an award of prejudgment interest on the initial deposit, as well as the Garners' request for attorney's fees.

The circuit court entered judgment on February 5, 2007, awarding the Garners $900,000 on the jury's verdict; prejudgment interest of 7% on the jury's verdict from January 23, 2003, until March 28, 2005; prejudgment interest of 7% on $447,455 from March 28, 2005, until entry of the judgment; attorney's fees of $75,000; and postjudgment interest at the rate of 10% on the $447,455, the $75,000 attorney's fees, and the amount of the prejudgment interest. The District filed a timely notice of appeal and now raises four points for reversal.

In its first point, the District argues that no prejudgment interest is due because the Garners presented no evidence which would allow the jury to fix the amount of prejudgment interest. The District relies on *Wilson v. City of Fayetteville*, 310 Ark. 154, 835 S.W.2d 837, *opinion on grant of reh'g*, 310 Ark. 163A, 838 S.W.2d 366 (1992), for the proposition that prejudgment interest is an element of the just compensation to be paid in condemnation cases and its rate is a question of fact. We hold that the District waited too late to raise this argument in the circuit court. After the jury rendered its verdict, counsel for the Garners asked the circuit court how it wished to proceed concerning the calculation of prejudgment interest. The court responded that it wanted the parties to attempt to reach an agreement but that, if one could not be reached, it would set the matter for a hearing. The District did not object to this procedure or move for a directed verdict at the close of all of the evidence

presented to the jury. It was not until it filed its response to the Garners' motion for entry of judgment that the District raised the issue of no proof being submitted so that the jury could decide the rate of prejudgment interest. Accordingly, the District may not assert this argument on appeal. *See Briscoe v. Shoppers News, Inc.*, 10 Ark. App. 395, 401, 664 S.W.2d 886 (1984) (holding that one may not complain of action he has induced, consented to, or acquiesced in). *Accord Cranfill v. Union Planters Bank, N.A.*, 86 Ark. App. 1, 158 S.W.3d 703 (2004).

The District's second point is related to its first. The District argues that the circuit court's decision to award 7% prejudgment interest is without sufficient evidentiary support. The District argues that the appropriate rate should be 2.875%, based on the yields available on CDs in the Northwest Arkansas area. The Garners submitted as an exhibit to its motion copies of the Federal Reserve Discount Rates from January 2003 until June 2006. Those figures show an average rate of 4% for that time period. The Garners sought five points above that rate, the maximum rate permitted in accordance with Ark. Const. art. 19, § 13. In response, the District submitted proof that the average one-year yield for CDs between January 2003 and January 2006 was 2.875%.The District's only objection was to the addition of points above the discount rate.

This court has affirmed prejudgment interest based upon a formula that took the average of local CD rates. *Arkansas State Hwy. Comm'n v. Security Sav. Ass'n*, 19 Ark. App. 133, 718 S.W.2d 456 (1986). However, we hold that this case is controlled by *Wooten v. McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981). In *Wooten*, the supreme court held that, where there was no statutory provision for prejudgment interest, it must be set in accordance with the constitution. Here, there is no statutory provision relating to prejudgment interest.

Therefore, *Wooten* requires that the prejudgment interest be set in accordance with the constitution.[2] The Garners submitted evidence of the Federal Reserve Discount Rate for the applicable period, pursuant to art. 19, § 13. The circuit court awarded prejudgment interest at a rate less than that called for by art. 19, § 13. However, the Garners do not cross-appeal on this point. Therefore, we cannot say that the circuit court clearly erred.

The circuit court's decision to award the Garners prejudgment interest on the entire jury award of $900,000 is the subject of the District's third point. The District argues that such an award was error because the Garners could have decided not to contest the necessity of the taking and withdrawn the initial deposit of $447,455 much sooner.

In awarding just compensation for the property taken, "the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984). Our supreme court has held that, as a matter of just compensation and due process under the federal and state constitutions, a landowner cannot be denied interest on the *unpaid* part of a condemnation award during the time he is deprived both of the use of the land and of the money representing its value. *Arkansas State Hwy. Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985). The general rule appears to be that prejudgment interest is not awarded on the initial deposit. *See E-470 Pub. Hwy. Auth. v. The 455 Co.*, 997 P.2d 1273 (Colo. App. 1999), *rev'd on other grounds*, 3 P.3d

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[2]The *Wooten* court set the prejudgment interest rate at 6% in a tort case. The Arkansas Supreme Court has held that prejudgment interest rate limitations cannot be applied if doing so would violate a landowner's constitutional right to "just compensation." *Wilson*, *supra*; *Arkansas State Hwy. Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985). Therefore, the Garners are not limited to prejudgment interest of 6%.

18 (Colo. 1999); *Eagle Sewer Dist. v. Hormaechea*, 707 P.2d 1057 (Idaho App. 1985); *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App. 2005); *Nichols on Eminent Domain* § 8.16. However, if the jury's award exceeds the amount of the deposit, interest is due on the difference from the date of the taking. *Wilson*, *supra*; *Vick*, *supra*; *Arkansas State Hwy. Comm'n v. Security Sav. Ass'n*, *supra*. This is because the deposit is merely an estimate, and the prejudgment interest is necessary to make the landowner whole because he was wrongfully deprived of his land or the money representing the value of the land.

The Garners argue that they were entitled to prejudgment interest because they were not entitled to withdraw the funds, thus making the funds and the land unavailable to them. As support, they rely on *Housing Authority of Little Rock v. Rochelle*, 249 Ark. 524, 459 S.W.2d 794 (1970). In *Rochelle*, the supreme court held that a deposit under what is now Ark. Code Ann. § 18–15-1206 (Repl. 2003) was not a tender that could be withdrawn by the landowner but was merely security for payment of the final award. The Garners' reliance on *Rochelle* is sound.

The District's petition states that it is proceeding under Ark. Code Ann. §§ 18-15-601 through 18-15-607. Section 18-15-605(a) provides that "further proceedings in the matter of assessment of damages and the making of deposits to secure the owner shall be the same as is now prescribed by law in reference to condemnation proceedings by railroad, telegraph, and telephone corporations[.]" In turn, condemnation proceedings by railroad, telegraph, and telephone companies are governed by Ark. Code Ann. §§ 18-15-1201 through 18-15-1207, which includes section 18-15-1206, the provision construed in *Rochelle*. The Garners could

not withdraw the initial deposit made by the District. Therefore, prejudgment interest on the entire amount of the jury's verdict was proper.

Finally, the District's fourth point is that the circuit court erred in awarding the Garners attorney's fees for what, according to the District, was essentially a discovery dispute. The District also asserts that the Garners did not submit any evidence as to the factors to be considered in determining a reasonable attorney's fees. This court's review of the circuit court's award of attorney's fees involves a matter of statutory interpretation. We review issues of statutory construction de novo because it is for this court to decide what a statute means. *City of Fort Smith v. Carter*, 364 Ark. 100, 216 S.W.3d 594 (2005).

Arkansas Code Annotated section 18-15-605 (Repl. 2003) provides for an award of attorney's fees in certain cases when a jury decides that the deposit made by the petitioning governmental unit is less than the reasonable value of the land. Specifically, section 18-15-605(b) states:

> In the case of application for orders of immediate possession by the corporation or water association, if the amount awarded by the jury exceeds the amount deposited by the corporation or water association in an amount which is more than twenty percent (20%) of the sum deposited, the landowner shall be entitled to recover the reasonable attorney's fees and costs.

The District argues that the fee awarded the Garners is not reasonable because approximately $50,000 of the fees were incurred prior to the time the Garners conceded the necessity of the taking on March 28, 2005, while the remaining fees were incurred in connection with the issue of the amount of compensation due. However, the statute is not so limited. Rather, the statute states that fees *shall* be awarded when the jury's verdict is more than 20% greater than the amount the District deposited. When a statute is clear, it is given

its plain meaning, and this court will not search for legislative intent. *City of Fort Smith*, *supra*. There is no question that the jury's award of $900,000 as compensation exceeded the $452,500 deposit by more than 20%.

The Garners' attorney submitted an affidavit setting out the amount of the fees and costs sought, $76,785.94. However, the affidavit did not set out the attorney's hourly rate or the number of hours spent on the case, other than to state that the "fees are reasonable, usual, and customary." There is no rule of law or procedure in this state that requires submission of time records in support of a request for payment of attorney's fees. *Harper v. Shackleford*, 41 Ark. App. 116, 850 S.W.2d 15 (1993). It is apparent that a considerable amount of time and labor was required to perform the legal services required by the Garners — the case took over three years from the date the District filed its petition until the entry of the judgment, and the transcript of the proceedings consists of three volumes comprising in excess of 800 pages. Furthermore, the Garners prevailed below and were awarded $900,000 as the value of their property, approximately twice the amount of the District's original deposit. In light of these facts and the factors enumerated in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), we cannot say that the circuit court abused its discretion in awarding an attorney's fee of $75,000.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.